SIXTH DIVISION
MAY 14, 2004

No. 1-01-4263

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 94 CR 20407
TIMOTHY KYLES,	)	Honorable Carol A. Kipperman, Judge Presiding.
Defendant-Appellant.	)	

ORDER

Defendant, Timothy Kyles, appeals from an order of the circuit court granting the State's motion to dismiss his amended supplemental post-conviction petition without an evidentiary hearing. He contends that the court erred in dismissing his petition at this stage of proceedings since he had made a substantial showing that his constitutional right to testify in his own defense was violated when his counsel prevented him from exercising that right at trial. Defendant further contends that his extended-term sentence was imposed in violation of the

ruling in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Following a jury trial, defendant was convicted of aggravated vehicular hijacking and unlawful use of a weapon. Based on his prior criminal history, defendant was sentenced to an extended term of 55 years' imprisonment. We affirmed that judgment on direct appeal in an order which fully sets forth evidence presented at trial. People v. Kyles, No. 1-96-2706 (1998) (unpublished order under Supreme Court Rule 23).

In his pro se post-conviction petition, defendant alleged inter alia, that he was denied his right to effective assistance of trial counsel who refused to allow him to testify in his own behalf, and appellate counsel for failing to raise the issues stated in his petition on direct review.

The circuit court appointed counsel to represent defendant and post-conviction counsel filed an amended supplemental petition arguing the necessity of an evidentiary hearing on defendant's claims. Post-conviction counsel further claimed that defendant's extended-term sentence was imposed in violation of the ruling in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Defendant filed an additional amended pro se petition and submitted an affidavit stating that his trial counsel repeatedly advised him not to testify, and that he thought this decision rested with trial counsel. Defendant also stated that counsel initially told him that he did not think it was a good idea for defendant to testify, and later said that he could not testify because of his criminal background and because it would hurt his appeal. Defendant further stated that he had pleaded guilty before, but never went to trial, that he was not advised by counsel or the court of his constitutional right to testify, and

would have testified if he had understood that whether or not to testify was his decision.

In response, the State argued that defendant failed to whether or not to include defendant's testimony was counsel's decision and urged the court not to engage in such speculation. The State further responded that defendant waived this issue by not voicing his desire to testify during the trial, at the close of trial, or in post-trial proceedings.

At the hearing on the motion to dismiss, post-conviction counsel argued that neither trial counsel nor the trial court properly admonished defendant of his right to testify, and that defendant was thus entitled to an evidentiary hearing. The State responded that there was no record evidence that defendant ever expressed his desire to testify to the court, and that he had thus waived the issue. In addition, the State noted that assert that he was told by trial counsel that the decision of defendant had two prior armed robbery convictions and one prior robbery conviction which counsel would not. want to place before the jury deciding defendant's case and so advised defendant.

Defense counsel maintained that the court could not consider defendant's thought. process here and make a credible determination without live testimony. Counsel argued that the only sure way to establish what defendant was thinking would be to bring in defendant and his attorney. The State pointed out that trial counsel was in the courtroom; however, it was noted that defendant was not.

The trial court was not convinced that defendant had made a proper showing and dismissed defendant's amended supplemental petition without an evidentiary hearing. Defendant now appeals from that ruling.

A defendant is not entitled to an evidentiary hearing on a post-conviction petition as a matter of right. People v. Barrow, 195 Ill. 2d 506, 519 (2001). Rather, an evidentiary hearing is warranted only when the allegations of the post-conviction petition, supported when necessary by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional rights have been violated. Barrow, 195 Ill. 2d at 519. In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and any accompanying affidavits must be taken as true. Barrow, 195 Ill. 2d at 519. Our review of the circuit court's dismissal order is de novo. Coleman, 183 Ill. 2d 366, 389 (1998). In this case, defendant challenges the propriety of the dismissal order entered by the court. He maintains that his petition and supporting affidavit made a substantial showing that his counsel prevented him from exercising his constitutional right to testify in his own defense and that he was entitled to an evidentiary hearing. In his affidavit, defendant stated that prior to trial and at the beginning of trial proceedings, he asked counsel if he could testify and was variously told that his testimony would hurt his appeal in light of his criminal background.

We initially observe that the decision of whether to take the witness stand and testify in one's own behalf ultimately belongs to defendant. People v. Thompkins, 161 Ill. 2d 148, 177 (1998). We further observe that the trial court is not required to advise defendant of his right to testify, to inquire whether he knowingly or intelligently waived that right, or to set of record defendant's decision on this matter. People v. Smith, 176 Ill. 2d 217, 235 (1997). Thus, defendant's allegations in this regard do not further his claim.

More importantly, we find that the allegations in defendant's post-conviction pleadings and affidavit do not substantially show a denial of his constitutional rights

with regard to counsel or his right to testify. Although defendant averred that he had expressed his desire to testify to counsel several times, nothing in the record demonstrates that he later reaffirmed that intention when it was time for him to testify by informing the trial court or his attorney that he wished to do so despite advice to the contrary. People v. Brown, 54 111. 2d 21, 24 (1973); People v. Sanders, 209 Ill. App. 3d 366, 376 (1991). This silence is perceived as acquiescence with counsel's trial strategy and a waiver of his right to testify. Smith, 176 111. 2d at 235-36; Thompkins, 161 111. 2d at 177-78; Sanders, 209 Ill. App. 3d at 376. Accordingly, we find that the circuit court properly denied defendant an evidentiary hearing in this case. Brown, 54 111. 2d at 24; see also People v. Knox, 58 111. App. 3d 761, 767-68 (1978) (no evidentiary hearing was required on this issue).

In reaching that conclusion, we find defendant's reliance on People v. Lester, 261 Ill. App. 3d 1075, 1079 (1994) misplaced. In the appeal filed after an evidentiary hearing on remand, the reviewing court explained that in the prior appeal it did not create a per se rule of ineffective assistance where counsel told his client that his testimony might hurt his appeal. People v. Lester, 291 Ill. App. 3d 66, 70 (1997). Further, the court clarified that such advice could serve to inform defendant of all the potentialities so that he could make an informed decision. Lester, 291 Ill. App. 3d at 70.

Finally, we reject defendant's argument that his extended-term sentence was imposed in violation of the ruling in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The supreme court has determined that Apprendi does not apply retroactively to criminal cases in which the direct appeal process concluded before Apprendi was decided. People v. De La Paz, 204 Ill. 2d 426, 429 (2003). In this case, defendant's

direct appeal process concluded before Apprendi was decided, thus Apprendi provides no basis for relief.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirm.

TULLY, J., with O'MARA FROSSARD, P.J., and FITZGERALD SMITH, J., concurring.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL. DISTRICT—SIXTH DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Respondent-Appellee,	)	
v.	)	No. 1-01-4263
TIMOTHY KYLES,	)	
Petitioner-Appellant.	)	

ORDER

This cause coming to be heard on Appellant's Petition for Rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Appellant's Petition for Rehearing is DENIED.

/s/_____
Justice
/s/_____
Justice
/s/_____
Justice

Order Entered August 17, 2004
Appellate Court, First District

99191

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
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November 24, 2004

Mr. Matthew T. Volk
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No. 99191—People State of Illinois, respondent, v. Timothy Kyles, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 16, 2004.